November 3, 2004

By Electronic Filing

Office of the Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: Notice of Ex Parte Contacts filed in the proceedings captioned: IP-Enabled Services proceeding - WC Docket 04-36; In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211

Dear Secretary:

On Monday, November 1, 2004,

(1) At 2:00 pm, NARUC representatives met with FCC Commissioner Kevin Martin. Present at the meeting by phone were NARUC President Stan Wise, NARUC Telecommunications Committee Chair Robert Nelson, and NARUC's Washington Action Committee Chair Glen Thomas. Present at the FCC were Brad Ramsay, NARUC's General Counsel, Gerry Lederer representing several local government groups, Paul Belgey with the National Association of Telecommunications Officers and Advisors, and Ron Teixeira and Diane Duff with the National Governors Association. Mr. Ramsay provided Commissioner Martin with the attached materials. Those present discussed several reasons why FCC action in the Vonage WC Docket 03-211 proceeding is premature. All those arguments are outlined in the attachments.

(2) At 3:00 pm, NARUC representatives had a conference call with FCC Chairman Michael Powell. Present with the chairman were Chris Libertelli, Michele Carey, Jeffrey Carlisle, and several other members of the Wireline Competition Bureau Staff. On the call from NARUC were members from almost all 50 States including the following commissioners: Mark Johnson, Alaska, Carl Caliboso, Hawaii, Jack Goldberg, CT, Charles Davidson, FL, Tom Welch, ME, Elliott Smith, Iowa, Ellen Williams, KY, Max Curran, MD, Alan Friefeld, MD, Bob Rowe, MT, Connie Murray, MO, Tony Clark, ND, Tom Dunleavy, NY, Glen Thomas, PA, Lee Beyer, OR, Ray Baum, OR, Bob Sahr, SD, Paul Hudson, TX, Steve Furtney, WY, Marilyn Showalter, WA, Larry Landis, IN, Connie Hughes, NJ, John Burke, VT NARUC Telecommunications Committee Chair Robert Nelson, speaking for NARUC, raised all of the concerns outlined in NARUC's October 20 ex parte opposing immediate action on the Vonage Petition. All of the arguments are attached in the reproduction of that letter included in the attachments below. Commissioner John Burke, a member of the Federal State Joint Board on Separations, asked the Chairman about his views of the State members of the Separations Joint Boards concerns about the anticipated FCC action. North Dakota Commissioner Tony Clark raised his concerns about the possible impact on intrastate access charges. Commissioner Landis raised some questions about the impact on the intercarrier compensation regime. Commissioners Welch, Davidson, Murry, and Williams all basically told the Chairman proceeding with a

preemptive approach in the Vonage order was the right way to proceed. Brad Ramsay, NARUC's General Counsel and Brian Adkins, NARUC's Telecom Congressional Advocate were also on the call.

(3) At 4:00, NARUC's General Counsel Brad Ramsay and Brian Adkins, NARUC's Congressional Advocate, along with Gerry Lederer, met with Commissioner Copps and his advisor Jessica Rosenworcel. Basically the same discussions concerning the potential unintended consequences of the proposed action on the Vonage petition were covered.

I was out of town yesterday and was unable to get back to town in time to prepare and file this ex parte. I respectfully request any waivers needed to file this notice of ex parte contacts one day out of time.

Respectfully Submitted,

James Bradford Ramsay
NARUC General Counsel

VOIP LETTERS/POSITIONS:

(1) October 29 AARP LETTER FROM MICHAEL NAYLOR (AARP DIRECTOR OF ADVOCACY) URGES FCC TO ADDRESS THE RANGE OF VOIP ISSUES IN A COMPREHENSIVE MANNER rather than acting in a piecemeal fashion. Page 2

(2) October 29 - THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES (NASUCA) URGES THE FCC NOT TO SEPARATE OUT THE JURISDICTIONAL ISSUES associated with the IP-Enabled Services proceedings from the other issues in that proceeding, but instead to complete the proceeding and act simultaneously on all existing issues in the IP-Enabled Services proceeding. Page 2

(3) October 29 GREAT PLAINS EX PARTE COVERING MEETING FCC'S JEFFREY CARLISE LISTS THE SIGNIFICANT UNINTENDED CONSEQUENCES OF AN INTERSTATE JURISDICTIONAL DETERMINATION FOR VOIP. Page 3

(4) October 26 STATE MEMBERS OF SEPARATIONS JOINT BOARD CALL ON FCC TO ADDRESS CRITICAL SEPARATIONS ISSUES BEFORE MAKING FINAL JURISDICTIONAL DETERMINATIONS. Page 3

(5) October 25 NATIONAL ASSOCIATION TO TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS URGE FCC TO REFRAIN FROM ACTING ON VOIP ISSUES IN A PIECEMEAL FASHION POINTING OUT HOW IT "prejudices the Commission's ability to holistically address the innumerable and important issues that have been raised by the Commission in its IP Enabled Services docket." Page 11

(6) October 20 NARUC URGES FCC TO ACT IN HOLISTIC FASHION - AVOID UNINTENDED IMPACT ON STATE USF FUNDS AND CREATING INCENTIVES FOR SOME PLAYERS TO "SLOW ROLL" CRITICAL USF/ INTERCARRIER COMPENSATION ISSUES. Page 12

(7) PROBLEM? FCC IS PUTTING THE JURISDICTIONAL CART BEFORE THE INTERCARRIER/USF HORSE. Page 15

(8) ***LISTING OF 23 OTHERS THAT ARE ON RECORD IN THE IP ENABLED RULEMAKING -OPPOSING EXCLUSIVE FEDERAL JURISDICTION OVER VOIP - INCLUDING AARP, NGA, AND NATIONAL CONSUMER'S LEAGUE. Page 15

(1) October 29 AARP LETTER FROM MICHAEL NAYLOR (AARP DIRECTOR OF ADVOCACY) URGES FCC TO ADDRESS THE RANGE OF VOIP ISSUES IN A COMPREHENSIVE MANNER rather than acting in a piecemeal fashion.

Dear Chairman Powell:

AARP understands that the Commission currently is considering a decision to declare VoIP/IP Enabled Services to be interstate services and not subject to state jurisdiction, prior to reviewing the myriad of other important issues that have been raised in the Commission's IP Enabled Services proceeding (WC-Docket No. 04-36, In the Matter of IP-Enabled Services). We urge the Commission to review all of the issues inherent in the provision of VoIP service at the same time.

Earlier this year, in comments submitted to the IP Enabled Services docket, AARP stated that residential consumers have come to rely on state regulation of telephone service quality to ensure that service is reliable and that there are appropriate consumer protections. Just as residential consumers expect these protections for traditional telephone services, they have every reason to expect that these protections would cover similar VoIP services. Regardless of the final decision on jurisdictional issues, we urge the Commission to consider all of the issues presented in the IP Enabled Service proceeding concurrently. A piecemeal approach will undermine the Commission's ability to address the potential ramifications of each decision on other VoIP-related issues. We urge the Commission to address the range of VoIP issues in a comprehensive manner.

Sincerely, Michael Naylor Director of Advocacy

(2) October 29 - THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES (NASUCA) URGES THE FCC NOT TO SEPARATE OUT THE JURISDICTIONAL ISSUES associated with the IP-Enabled Services proceedings from the other issues in that proceeding, but instead to complete the proceeding and act <u>simultaneously</u> on all existing issues in the IP-Enabled Services proceeding.

Dear Mr. Chairman:

The National Association of State Utility Consumer Advocates (NASUCA) urges the FCC not to separate out the jurisdictional issues associated with the IP-Enabled Services proceedings from the other issues in that proceeding, but instead to complete the proceeding and act <u>simultaneously</u> on all existing issues in the IP-Enabled Services proceeding.

NASUCA understands that VoIP may offer important benefits to consumers but believes that a number of critical issues must be comprehensively considered to ensure that a sound regulatory policy is developed. These issues include universal service and universal service support, local number portability, customer service and access to and support of E9-1-1. A complete listing of our concerns about VoIP can be found in our filing in WC Docket No. 04-36.

NASUCA concurs with those parties – which include the National Association of Regulatory Utility Commissioners, the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities and the United States Conference of Mayors, among others – who have recently urged the FCC to refrain from deciding the jurisdictional issue now, while addressing other VoIP issues later, and who support a "holistic" approach to VoIP.

NASUCA is concerned that a piecemeal approach to these proceedings – as proposed by a recent letter from certain House members suggesting an expeditious resolution to jurisdictional matters – only promises to derail a rational approach to VoIP, resulting in muddled, conflicting, and anticonsumer policies.

All aspects of this proceeding must be carefully considered simultaneously. Anything less would jeopardize the promise of this new technology.

Sincerely yours, Charles A. Acquard, Executive Director

(3) October 29 GREAT PLAINS EX PARTE COVERING MEETING FCC'S JEFFREY CARLISE LISTS THE SIGNIFICANT UNINTENDED CONSEQUENCES OF AN INTERSTATE JURISDICTIONAL DETERMINATION FOR VOIP.

Great Plains Ex Parte With FCC's Jeffrey Carlise – Covers Unintended Consequences of an Interstate Jurisdictional Determination for VoIP or Other IP-Enabled Services by the FCC

(1) The determination could significantly undermine the assessment base for state universal funding. Carriers would have incentive to declare their service delivery as IP to avoid state assessment.

(2) The determination will confuse or eliminate the intercarrier compensation obligations for IP providers that originate or terminate traffic to the PSTN in an intrastate or local interconnection environment.

This again provides a motivation for gaming by labeling traffic as IP in order to avoid costs.

(3) The determination would affect separations and the classification of revenues. Because IP services use the underlying network infrastructure those costs and revenue assignments would become confused.

The determination would preempt the investigation in the IP-Enabled docket and is therefore premature.

Technology may indeed provide a means to explicitly identify the end points of an IP connection in the future. Therefore the preemptive determination of jurisdiction would be subject to future legal action.

(4) The consumer and universal service impacts have not been determined.

(4) ***OCTOBER 26 (today) STATE MEMBERS OF SEPARATIONS JOINT BOARD CALL ON FCC TO ADDRESS CRITICAL SEPARATIONS ISSUES BEFORE MAKING FINAL JURISDICTIONAL DETERMINATIONS. (Today - October 26) See Below (and Attached PDF File)

A - SUMMARY OF FILING: The Commission is widely reported to be considering a decision to declare IP-enabled services to be interstate services and not subject to state jurisdiction. The State Members of the Separations Joint Board ("State Members") file these comments to reiterate and expand upon our previous observation that any such decision will significantly affect the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations. Therefore, consistent with section 410(c) of the Act, the Commission should make a referral to the Joint Board before acting.

The State Members would like a full opportunity to discuss with our federal colleagues the inevitable effect of preemption on separations and therefore on state telecommunications rates. Accordingly, to ensure that the Commission has an opportunity to consider the possible implications of such preemptive action on the jurisdictional separations process, the State Members of the Separations Joint Board submit these comments. They address the likely effects of federal preemption of all IP-enabled services, including Voice over Internet Protocol communications ("VoIP").

The State Members conclude that federal preemption of VoIP traffic would have significant effects on jurisdictional separations and also on the ability of states to recover costs separated to the intrastate jurisdiction through the existing separations process. In summary, preemption would exacerbate the tendency of VoIP traffic to impose costs on the state jurisdiction, but with little or no revenue; and it could prevent states from collecting a reasonable contribution to

joint and common costs from VoIP traffic. In addition, federal preemption would exacerbate some existing problems relating to DSL lines. Finally, federal preemption could require ending the freeze immediately or it could complicate consideration of whether or how to end the separations freeze in 2006.

We recommend a number of steps. These include issuing a Notice of Proposed Rulemaking ("NPRM") on possible changes to the frozen separations factors due to preemption, possible changes due to increasing sales of DSL, and the collection of data relating to the end of the freeze.

B - FULL TEXT OF STATE MEMBER COMMENTS: LATE-FILED COMMENTS By State Members of Separations Joint Board

Summary

The Commission is widely reported to be considering, in the above-captioned proceedings, a decision to declare IP-enabled services to be interstate services and not subject to state jurisdiction. The State Members of the Separations Joint Board ("State Members") file these comments to reiterate and expand upon our previous observation that any such decision will significantly affect the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations. Therefore, consistent with section 410(c) of the Act, the Commission should make a referral to the Joint Board before acting. [Footnote 1 - 47 U.S.C. § 410(c) requires the Commission to refer to the Joint Board any matter instituted pursuant to a Notice of Proposed Rulemaking regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations.]

The State Members would like a full opportunity to discuss with our federal colleagues the inevitable effect of preemption on separations and therefore on state telecommunications rates. Accordingly, to ensure that the Commission has an opportunity to consider the possible implications of such preemptive action on the jurisdictional separations process, the State Members of the Separations Joint Board submit these comments. They address the likely effects of federal preemption of all IP-enabled services, including Voice over Internet Protocol communications ("VoIP").

The State Members conclude that federal preemption of VoIP traffic would have significant effects on jurisdictional separations and also on the ability of states to recover costs separated to the intrastate jurisdiction through the existing separations process. In summary, preemption would exacerbate the tendency of VoIP traffic to impose costs on the state jurisdiction, but with little or no revenue; and it could prevent states from collecting a reasonable contribution to joint and common costs from VoIP traffic. In addition, federal preemption would exacerbate some existing problems relating to DSL lines. Finally, federal preemption could require ending the freeze immediately or it could complicate consideration of whether or how to end the separations freeze in 2006.

We recommend a number of steps below. These include issuing a Notice of Proposed Rulemaking ("NPRM") on possible changes to the frozen separations factors due to preemption, possible changes due to increasing sales of DSL, and the collection of data relating to the end of the freeze.

A. Request To File Comments

State Members respectfully request that the Commission authorize, within the meaning of Section 1.415(d) of its rules, the following out-of-time comments ("Comments") in the above captioned proceedings addressing separations issues raised by possible FCC action. [Footnote 2 - Section 1.415(d) of the Commission's Rules states that "..[n]o additional..",i.e., out-of-time, "...comments may be filed unless specifically requested or authorized by the Commission." See also, Sections 1.41, 1.44 of the Commission's Rules of Practice and Procedure] We ask the Commission to grant any waivers and/or authorizations that may be necessary to allow this filing.

State Members are making this filing because they have recently seen press statements that the FCC might be considering segregating jurisdictional issues from the generic IP rulemaking for early action. The subject matter at issue in this proceeding is of significant interest to the State Members, given its impact on the Separations process and ultimately on state rates. No other participant's comments can adequately represent the viewpoint of the State members, and we respectfully suggest that this viewpoint (and the need for a recommendation and referral of the relevent issues) is necessary to fully illuminate the issues raised by the FCC's proposal and develop a complete record upon which to base a decision. Hence, granting the requested authorization and/or waivers will serve the public interest.

No other participant will be prejudiced by allowing this late filing as most were logically expecting the FCC to act comprehensively in the generic IP rulemaking on this and related issues; and any who are concerned can still raise those concerns via an *ex parte* filing.

Alternatively, the State Members request that these Comments be accepted as written *ex parte* communications within the meaning of Section 1.419(b) and 1.1206 of the Commission's regulations. [Footnote 3 -

Subject to certain conditions, a person may file "informal" ex parte comments after the deadline for reply comments. See 47 C.F.R. Section 1.419(b), which states that "[i]nformal comments filed after close of the reply comment period...should be labeled "ex parte" pursuant to section 1.12066(a) of this Chapter."]

B. Separations Background

As the Supreme Court recognized in 1930, procedures for the separation of intrastate and interstate property and expenses are necessary for the appropriate recognition of authority between the interstate and intrastate jurisdictions. [Footnote 4 - *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930).] For the states, jurisdictionally separated costs are important because they define the state's constitutional obligation to avoid an uncompensated taking of utility property.

Our dual system of regulating telecommunications has worked reasonably well because both state and federal regulators have cooperated in trying to align jurisdiction, revenues, and costs. When a service is interstate, revenues from that service are recorded as interstate. Separations then seeks to assign with reasonable accuracy costs to the same jurisdiction in which revenues are recorded. Those costs include all directly incurred costs, plus a share of joint and common cost.

This is not to suggest that separations results are or ever were exactly correct. The result must, however, be reasonable. Moreover, the 1996 Act requires that services "included in the definition of universal service" cannot bear any more than a "reasonable share of the joint and common costs of facilities used to provide those services." *[Footnote 5 - See* 47 U.S.C. § 254(k).]

Separations rules have a significant effect on state rates. Many states still set those rates using a traditional "cost of service analysis" in which rates are set so that expected revenues equal the costs assigned to the state by separations. In these states, separations results have a direct effect on local rates. Other states use intrastate-separated costs as an element in their state universal service fund calculations.

Separations rules also affect the interstate jurisdiction. Many local exchange carriers remain under "rate of return" regulation as "cost" companies. Separated costs of these companies still affect the rates charged by these companies for interstate services.

Separations factors have been frozen since 2001 and will remain so until 2006. In its 2001 order adopting the freeze, [Footnote – 6 - *Jurisdictional Separations Reform And Referral To The Federal-State Joint Board*, CC Docket No. 80-286, "Report and Order," FCC 01-162 (rel. May 22, 2001) ("*Freeze Order").*] the Commission made several commitments to the states. Because of new technologies and the emergence of local exchange service competition, the Joint Board had previously recommended that during the freeze the Joint Board and the Commission would continue to work on four separations issues: 1) unbundled network elements (UNEs); 2) digital subscriber line (DSL) services; 3) private lines; and 4) Internet traffic. [Footnote 7 - *Id.*, para. 31.] In its Freeze Order, the Commission agreed:

> that the comprehensive review of the separations process must continue during the freeze, and we thus commit to working with the Joint Board on a continuing basis during the freeze. As part of that continuing effort towards comprehensive reform, we commit to working with the Joint Board to begin to address the four specified issues during the freeze. *[Footnote 8 - Id.*, para. 33.]

In another part of the Freeze Order, the Commission reiterated its commitment to "working with the Joint Board on a continuing basis to address the impact of the Internet and the growth in local minutes during the interim freeze." [Footnote 9 - *Id.*, para. 42.]

C. Preemption Generally

Preemption of VoIP would reclassify what formerly were state services into interstate services. This can affect separations in two ways.

First, preemption would likely require changes to cost separations. Depending on its scope, preemption would likely require reexamination of some of the factors used to separate costs. The most financially significant separations factor is the basic "25-75" factor that is used to separate the costs of subscriber common lines ("Category 1.3") and circuit equipment. This factor has been fully in place since 1993, and it was prescribed in 1987 at a time when interstate traffic was a mere 13 percent of total traffic. [Footnote 10 - Universal Service Monitoring Report, 2003, Table 8.3 (Dial Equipment Minutes Summary).]

Other costs, such as switching, are separated by measured network usage, recorded as usage "factors." Normally, a preemptive reclassification would change the identity of traffic, and therefore the results of traffic measurement, and the resulting usage-sensitive separation factors. Under the freeze, however, the factors are frozen until 2006.

Second, preemption affects the classification of revenue. Historically, revenue accounting has been straightforward. Services tariffed at the FCC produced interstate revenue, and services tariffed at the state commissions produced intrastate revenue. Because interstate services produce interstate revenue, reclassification normally increases

interstate revenue and decreases state revenue. To avoid raising local exchange rates, it could be necessary to similarly transfer the corresponding costs.

D. Separations, the Internet and the Freeze

The effect of the Internet on separations is not a new issue. This Joint Board recommended a separations freeze in July of 2000. At that time, the Commission was considering whether to declare Internet traffic to be interstate. The Joint Board recommended that, should such a declaration be made, a small adjustment should also be made to the existing Dial Equipment Minute ("DEM") factors. The Joint Board suggested a "default estimate" that would have frozen the local DEM at 95% of the current year level. In other words, the Joint Board recommended that, at the outset of the freeze, the local DEM level for the base year be reduced by 5%, and that 5% would be shifted to interstate DEM, and the adjusted levels would be frozen. [Footnote 11 - *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Recommended Decision*, FCC 00J-2, released July 21, 2000 ("*Freeze RD*"), para. 29.] The four state commissioners clarified their understanding of the recommendation by stating that they endorsed a freeze of the local DEM factor at *no more* than 95 percent of the current year level, unless a different conclusion was warranted by the record. [Footnote 12 - *Id. Joint Separate Statement of Chairman Thomas L. Welch, Commissioner Joan H. Smith, Commissioner Diane Munns, and Commissioner Joseph P. Mettner.*] The recommended decision also recommended that four issues, including Internet traffic and DSL, "must be addressed by the Joint Board and the Commission in the near future as a result of the emergence of new technologies and local exchange service competition." [Footnote 13 - *Id.*, para. 27.]

When the Commission adopted a freeze, it rejected the Joint Board's recommendation, finding that it lacked "reliable data upon which to set the amount of any local DEM factor reduction that may be warranted." [Footnote 14 - *Freeze Order,* para 40.] Although commenters had estimated the percentage of intrastate traffic that represents Internet traffic to range from 3.1% to 71.5%, the Commission asserted that no party had "provided concrete evidence demonstrating rate increases or other actions directly attributable to increased Internet usage." [Footnote 15 - *Id.*, para. 38.]

Furthermore, the Commission noted that it had directed carriers to treat the traffic-sensitive local switching costs that ISPs incur through their connections to LEC end-offices as intrastate for separations purposes, thereby avoiding cost-revenue mismatches. [Footnote 16 - *Id.*, para. 39.]

This was a curious conclusion in several respects. First, it assumed that Internet traffic did not generate any non-traffic-sensitive costs. Second, it assumed that the Commission could direct that an interstate service would be sold from state tariffs and the revenues assigned to state accounts. Third, it assumed that revenues collected in this manner would match the costs of the service.

As noted above, the Commission "commit[ted] in the Freeze Order to working with the Joint Board on a continuing basis to address the impact of the Internet and the growth in local minutes during the interim freeze." [Footnote 17 - *Id.*, para. 42.] Unfortunately, this question has not been addressed in any substantial way since the freeze was imposed.

This Joint Board is currently evaluating whether to recommend continuation of the current freeze on separations factors beyond its current sunset date of 2006. Under the freeze, regulated companies are still using separations factors that were calculated based on operations in 2000.

In the *MCI* case, the courts established that an interim freeze of the separations process was permissible while considering separations reform. Inaccuracy in separations factors is permissible, however, only as long as it is (a) temporary and (b) within reasonable bounds. [Footnote 18 - *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).]

In deciding whether to recommend continuation of the freeze, the broadest question before the Joint Board is whether the existing factors still produce a fair allocation of cost, particularly given new patterns in revenue generation. To reach a conclusion, the Joint Board must consider whether the factors have become obsolete by changing jurisdictional rules or by changing network structure or usage. We also must consider what would happen if the freeze were to expire by its own terms, and traffic measurement to recommence.

Network usage is changing, and the frozen factors are inevitably becoming less accurate measures of actual network usage. This suggests a need to end the freeze. On the other hand, VoIP usage is making switched network usage measurements increasingly unreliable. This suggests a need for another method of separating costs.

The State Members believe that the decisions being considered in several matters before the Commission would cause the frozen separations factors to become so inaccurate as to violate the *MCI* standard. If, for example, the Commission were to make a decision that many intrastate calls are actually interstate, the existing separations freeze may become so inaccurate that it cannot be sustained without substantial modification, if at all. That problem would make the use of existing frozen factors unlawful because those decisions would exacerbate existing revenue-cost mismatches.

E. Separations, VoIP and Traffic Usage

In 2000, Internet usage was primarily for data, particularly transmission of Web pages. The effects on the switched network were indirect and mixed. There were even some positive financial effects, such as added line sales, that partially offset incremental costs. Now, however, several companies are offering VoIP, and many of these calls are originating or terminating on the switched network. VoIP providers now claim hundreds of thousands of customers. Millions of customers are forecast, and several large switched carriers are planning to convert some or all of their systems to IP format. With this VoIP growth, the impact on the switched network has become more direct, and its character has changed, as explained below.

Some forms of VoIP communication have no direct effect on separations or state rates. Broadband-to-broadband communications, even voice services such as those considered recently in the *Free World Dialup* decision, may depress usage on the switched network, but they do not interact with that network. These indirect effects give us no reason to suggest any change to separations procedures.

If other forms of VoIP are declared to be interstate, however, we foresee significant effects on separations and on state ratemaking. When VoIP traffic uses the switched network for origination, termination or transiting, it imposes costs on LECs, and it may create revenues for LECs. However, its jurisdictional nature is difficult or impossible to measure. As explained below, this conclusion applies both to traffic originated by VoIP phones and traffic terminated on VoIP phones.

1. VoIP-Originated / Switched-Terminated

Switched interexchange carriers ("IXCs") are required to identify the jurisdictional nature of their traffic and to pay compensation to other carriers accordingly. For example, when an IXC carries a call between two customers in different states, the IXC classifies the call as interstate, and that information is conveyed throughout the network. The terminating carrier can then charge the IXC the jurisdictionally appropriate rates, and the terminating carrier's network can properly record the nature of its own traffic.

VoIP traffic does not follow these rules. Most state and federal regulators have allowed VoIP carriers to terminate traffic without declaring its jurisdictional nature and without paying traditional jurisdictionally defined charges. As a result, the nature of VoIP traffic is often unascertainable. With VoIP, any of three kinds of calls (interstate-toll, intrastate-toll and local) can appear on a terminating carrier's network in any form. For example, a coast-to-coast VoIP call can appear on the switched network as a local call. While this call appears "local," it is really "interstate" under current law. The result is three possible methods to terminate each of the three kinds of calls. Of the nine possible combinations, three are matched and six are mismatched. As a result, LEC traffic measurements of terminating traffic become unreliable to the extent that they include VoIP traffic.

2. Switched-Originated / VoIP-Terminated

When a call is generated on the switched network, the originating carrier classifies the call based on the NPA and NXX of the called party. If the called party is in another state, usually the originating carrier will classify the call as interstate, and the minutes of use will be so recorded.

VoIP telephones, however, are portable. They require a broadband Internet port, but that port can be physically located anywhere in the world. For this reason, using the classical NPA and NXX method of determining jurisdiction is unreliable when a switched call terminates on a VoIP phone.

As a result, LEC traffic measurements of originating traffic are unreliable to the extent that they include VoIP traffic.

3. Preemption and the Separations Factors

Measurement errors, to the extent they arise after 2000, may not now be causing any harm since separations factors are currently frozen. [Footnote 19 - Revenue-cost mismatches arising from jurisdictional reclassifications are considered in the next section.]They might, however, have a substantial effect if the freeze is allowed to expire, and that might be one reason to extend the freeze. [Footnote 20 - Errors also can be expected to affect rate designs in at least one state that did not freeze separations for state ratemaking purposes.]

If VoIP is preemptively an interstate service, however, the freeze issue changes. Measurement problems would be compounded. A call that is today an intrastate toll call, for example, might be terminated by a VoIP carrier as intrastate-local; yet it would still be recorded as intrastate and would cause no jurisdictional errors. With preemption, however, those calls would be interstate, and a record of the call as a local call would be inaccurate.

F. Separations, VoIP and Costs

1. Direct Assignment

Some carrier equipment today is directly assigned. For example, private line equipment is assigned entirely either to the interstate or the intrastate jurisdiction. Most telephone plant, however, is commonly used for both interstate and intrastate services; and this equipment is separated using either fixed factors or usage factors.

If the Commission were to declare VoIP interstate, that decision would presumably apply to all carriers, including LECs. It seems likely that some joint and common LEC equipment would become single-purpose equipment. Such VoIP-dedicated equipment might include Internet routers, but also (depending on the telephone company's choice of technology) much or all of its switching, transport and loop plant. More detailed special assignment rules may be needed reflecting varying levels of VoIP technology implementation.

In a full conversion of a LEC's system to VoIP, current rules may require all telephone plant to be directly assigned to interstate. This would leave the intrastate jurisdiction without any plant or expenses, and that could lead to elimination of and need for any state rates, including local exchange rates.

Carriers can be expected to oppose elimination of local exchange rates, particularly if the Commission does not provide a replacement revenue source. If the direct assignment rules are not clarified, carriers could be inadvertently deterred from converting their networks to IP networks.

2. Current Mismatches For Traffic Terminating As Local Calls

We noted above that VoIP produces six kinds of jurisdictional mismatches. We consider here the cost implications of two such mismatches.

a) The Interstate Toll Call Terminated as Local

A VoIP carrier can transport a call between end users in different states, but terminate the call from a retail business line. [Footnote 21 - This is a frequent occurrence because in many areas it is a least-cost termination method for VoIP calls. VoIP carriers may also use Centrex lines for the same purpose.] The VoIP carrier uses that line for termination, using it as a kind of terminating trunk to the end user. Usage on these lines is not likely to be similar to typical business lines. The local exchange carrier records only a local call from the VoIP carrier's business line to the terminating end user.

These calls can create incremental costs in both jurisdictions. Incremental costs could include additional concentrator equipment and more line cards in the switch as the local network's usage characteristics change. [Footnote 22 - Concentrator equipment and switch line cards typically are designed to allow only a small fraction of lines to be in use at the same time.] Absent any changes to the rules, any incremental investment would be separated using the existing fixed separations factor for common line and circuit equipment: 75 percent of the incremental cost would fall on the intrastate jurisdiction, and 25 percent on interstate.

Incremental costs could also include larger switches. If, as is often true, the local calling area comprises more than one exchange, more interoffice trunks may also be needed. These incremental costs would be separated by the frozen factors. At least for the larger companies, about 70 percent of the incremental cost would fall on the intrastate jurisdiction and 30 percent on interstate. [Footnote 23 - ARMIS figures for 2003 show that for all Bell Operating Companies, Central Office Equipment was separated approximately 71 percent to state and 29 percent to interstate.]

These calls are likely to produce an intrastate cost-revenue mismatch, particularly if the VoIP provider uses its line heavily. Most states follow the practice of "flat rating" all local calls. In those states, the only charge is the local monthly business line rate, and the VoIP call will fail to generate any incremental local exchange revenue. Revenue requirements arising from incremental costs therefore could be shifted to other intrastate service users, who could be required to subsidize the interstate VoIP service.

An interstate cost-revenue mismatch is also likely. There is no interstate revenue in this scenario. Interstate costs will be shifted to other interstate service users, who might also be required to subsidize the VoIP traffic. The burden on those other customers will increase as VoIP displaces traditional interstate access revenues.

In this scenario, the VoIP call makes at most a limited contribution to the joint and common costs of providing loops, and circuit, switching and trunking equipment. This could violate 47 U.S.C. § 254(k). [Footnote 24 - Section 254(k) requires that "services included in the definition of universal service [shall] bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."]

In summary, the interstate/local VoIP call leaves both jurisdictions with incremental costs that cannot be recovered and might fail to collect a sufficient contribution toward the costs of joint and common equipment. Because this hypothetical VoIP call has been postulated as an interstate call, preemption would not alter this analysis. The act of preemption, however, would probably have the practical effect of ratifying the status quo.

b) The Intrastate Toll Call Terminated as Local

A VoIP carrier can also transport a call between customers in different calling areas of the same state, but terminate the call from a business line or Centrex line. Once again, the local exchange carrier records only a local call from the VoIP carrier's business line to the terminating end user.

This scenario is similar to that described above with regard both to an interstate cost-revenue mismatch [Footnote 25 - In this case the problem is not made worse by any loss of interstate access revenue.]and to a limited contribution to the joint and common costs of joint and common equipment.

The intrastate cost-revenue mismatch is worse in this scenario, however. The same incremental revenue is received as for an interstate call, and the same incremental costs are imposed, but there is an additional loss of intrastate toll access revenue. The resulting mismatch could affect local rates, particularly in rural study areas.

In summary, the intrastate/local VoIP call leaves both jurisdictions with incremental costs that cannot be recovered, a problem that can be particularly serious for the state jurisdiction. In addition, there might be an insufficient contribution toward the costs of joint and common equipment.

Preemption would exacerbate this situation because it would remove from the state the ability to collect access revenue for an intrastate toll call and because it might prevent the state jurisdiction from collecting the incremental state costs created by the VoIP call.

c) State Authority Over Local Calls

Under present law, states could theoretically address most of these issues through changing their rate designs for local traffic. A state might, for example, prohibit business line users from using their lines for such purposes in the first place, although that would be difficult to enforce. If the Commission were to preempt all VoIP traffic, however, states might no longer feel able to address the cost/revenue imbalance or the need to properly allocate joint and common costs as required under the second sentence of section 254(k). Preemption of VoIP therefore might remove from the states the ability to design intrastate rates and to allocate costs among the users of intrastate services.

VoIP growth could easily magnify this harm. VoIP already has an economic advantage in terminating traffic, and a preemption decision could clear away the risk that states might eliminate this advantage. This could accelerate network conversion to IP format. Such a result may not be bad in itself, but it leads to a secondary result, the magnification of any cost/revenue imbalances and mandated subsidies. As noted above, full VoIP conversion could also eliminate any need for intrastate rates. If the Commission is considering preempting the states, it should anticipate the long-term effects of its decision, including how costs will be recovered in a world in which VoIP predominates.

3. Post-Preemption Cost Mismatches

The preceding discussion assumes that current VoIP termination arrangements will continue unaltered. Earlier this year, the Commission indicated that those arrangements might change. The Commission members stated their belief that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." [Footnote 26 - *Matter of IP Enabled Services,* WC Docket No. 04-36, FCC 04-38, released Mar. 10, 2004, para. 61.] The Commission has not indicated how this compensation would be established. We assume for purposes of these comments that the Commission contemplates a system, like toll access or reciprocal compensation, in which a VoIP provider seeking to terminate its traffic through a switched carrier must identify its termination request and compensate the terminating provider at some prescribed rate.

The jurisdiction assigned to any such LEC revenue is an important separations issue. As we noted above, current separations rules currently assign at least two-thirds of the incremental costs of providing VoIP termination on local lines to the state jurisdiction. To maintain basic fairness in the separations system, revenue from these services should be assigned in a like manner. It would be of serious concern to the State Members if revenue generated by VoIP service fails to contribute in any way to intrastate costs that it creates. Moreover, assignment of those revenues solely to the interstate jurisdiction would violate the requirements of section 254(k) of the Act. [Footnote 27 - Section 254(k) requires that "services included in the definition of universal service [shall] bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."]These problems might, at minimum, prevent us from supporting extension of the existing freeze and might justify immediate termination of the freeze and prescription of new measurement techniques or allocation percentages.

G. DSL

A decision declaring VoIP to be interstate would exacerbate a set of existing problems relating to the separation of DSL costs. Since 1998, the Commission has allowed carriers to treat DSL revenues as interstate revenues, but it made no adjustment to separations and did not refer the question to this Joint Board. In 2000 this Joint Board recommended continued study of the DSL issue, [Footnote 28 - *Freeze RD*, para. 27.]but no such continued study has occurred.

We remain concerned about the effect of DSL on basic rates. We believe that in order to deploy DSL, many carriers are incurring intrastate costs for line conditioning and for remote fiber platforms. There is no matching intrastate revenue. Once again, this raises questions about the basic fairness of cost separations and whether DSL services are contributing sufficiently to the joint and common costs of universal service.

Two additional developments will make this problem worse. First, the DSL problem has become more acute since carriers have begun to offer DSL to customers who do not subscribe to voice services ("Solo DSL"). With traditional DSL, while all revenue is interstate, 75 percent of common line cost is assigned to the state. At least in this circumstance, the cost can be recovered through the sale of the loop for voice service. With Solo DSL, however, that

revenue source disappears. This problem could be corrected by directly assigning the loop to interstate, but we are not certain that carriers selling solo DSL are actually taking this step.

Second, if VoIP displaces a larger portion of toll and local traffic, the financial imbalances described above will be magnified. The worst case would be VoIP traffic that rides on a solo DSL platform. If all such traffic and services are declared interstate, the intrastate jurisdiction would have no possible revenue sources to cover the 75 percent of loop cost assigned to the states.

H. Recommendations

If the Commission does declare IP-enabled services to be interstate, the undersigned State Members recommend several steps to the Commission.

1. Rate Design Discretion

The Commission should expressly state that its preemption does not impair state discretion over rate design for all local exchange services, including VoIP calls terminating over business lines. Business line tariffs have been designed on the assumption that only retail customers would use them. They were not designed to allow telecommunications carriers to use them as terminating trunks. Yet VoIP providers are doing exactly this. If the Commission preempts state jurisdiction over VoIP, and if it continues to rely on state business lines to terminate those VoIP calls, the Commission should at the very least expressly preserve state discretion to design local exchange rates for those business or Centrex lines in a way that recovers costs from cost-causers. [Footnote 29 - For example, a state might choose to impose local measure service charges on some or all business line traffic, either originating or terminating. Or, a state might develop subclasses of business lines, based upon characteristic usage patterns.]

2. Separations Factor Changes

If the Commission preempts the states on VoIP, it should issue a Notice of Proposed Rulemaking proposing several changes to separations rules. We recommend that the NPRM solicit comment on the following changes:

- Changing the fixed allocator for loop plant found in 47 C.F.R. § 36.154(c). Until reliable studies can be produced showing the extent of interstate Internet and VoIP traffic that is being recorded as local traffic, we tentatively conclude that, following preemption of IP-enabled services, 50 percent of subscriber common line investment should be assigned to the interstate jurisdiction. Where a carrier has completely converted its network to IP format, 100 percent of its investment should be assigned to interstate.
- Adjustment of frozen usage-sensitive factors. As discussed above, allocating costs properly for VoIP services is difficult because the jurisdictional nature of the traffic cannot be ascertained by the switched carrier that is asked to terminate that traffic. Therefore, it will be difficult to measure, or even estimate, the appropriate adjustments to interstate usage factors. Until reliable studies can be produced showing the extent of interstate-local traffic, we tentatively conclude that, following preemption, frozen separations factors should be changed by transferring 33 percent of each company's current local DEM to the interstate jurisdiction and recalculating separations factors accordingly. Where a carrier has completely converted its network to IP format, 100 percent of its investment should be assigned to interstate.
- Adjustment of universal service parameters. A multitude of universal service programs provide support to high-cost carriers. Any adjustment to separations factors could require parallel adjustments to the assumptions and parameters used in these calculations. An NPRM should inquire whether any changes are needed to the rules under which such support is calculated.

3. DSL

We tentatively conclude that when a carrier provides Solo DSL, the carrier should identify that loop as Cable and Wire Facility, Subcategory 1.2, (Interstate private lines and interstate WATS lines). Such facilities are directly assigned to interstate. However, we recognize that there may be some ambiguity in the rules, and that they may need to be clarified.

We recommend that the separations NPRM described above should also solicit comment on the following changes relating to DSL:

- Changing 47 C.F.R. § 36.154(a) to clarify that Solo DSL Exchange Line C&WF is Cable and Wire Facility, Subcategory 1.2, (Interstate private lines and interstate WATS lines) and should be directly assigned to interstate.
- Changing the fixed allocator in 47 C.F.R. § 36.154(c) for loops providing both DSL and voice. Until reliable studies can be produced showing the extent of interstate-local traffic, we tentatively conclude that, the 25 percent fixed allocator should be changed to allocate 66.7 percent of subscriber common line investment to the interstate jurisdiction.

4. Freeze

Fourth, we further recommend the NPRM include several questions regarding the end of the freeze. We are separately undertaking a data collection effort regarding the freeze, its effects, and the likely effects of ending the

freeze. We want to emphasize here that the importance of that data collection would only be increased by a Commission decision altering existing jurisdictional rules regarding VoIP. Asking for comment on those same questions would increase our understanding of the effects of VoIP on traffic, the separations factors, and it would improve our understanding of the options surrounding the end of the freeze.
Respectfully Submitted,
State Members of Separations Joint Board

Paul Kjellander
State Chair of Federal-State Joint Board and
President, Idaho Public Utilities Commission

Diane Munns
Chair, Iowa Utilities Board

Judith Ripley
Commissioner, Indiana Utility Regulatory Commission

John Burke
Board Member, Vermont Public Service Board

October 26, 2004

(5) ***OCTOBER 25 (Yesterday) NATIONAL ASSOCIATION TO TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS URGE FCC TO REFRAIN FROM ACTING ON VOIP ISSUES IN A PIECEMEAL FASHION POINTING OUT HOW IT "prejudices the Commission's ability to holistically address the innumerable and important issues that have been raised by the Commission in its IP Enabled Services docket." (See Below)

NATIONAL ASSOCIATION TO TELECOMMUNICATIONS OFFICERS AND ADVISORS - NATIONAL ASSOCIATION OF COUNTIES - NATIONAL LEAGUE OF CITIES- UNITED STATES CONFERENCE OF MAYORS October 25, 2004 Hand Deliver

Honorable Michael Powell Chairman
Honorable Kathleen Abernathy
Honorable Michael Copps
Honorable Kevin Martin
Honorable Jonathan Adelstein
Commissioners
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Continuing Request that the Commission Refrain from Acting on Voice-over-Internet Protocol ("VoIP") Issues in a Piecemeal Fashion.

Dear Mr. Chairman Powell and Commissioners Abernathy, Copps, Martin and Adelstein:

The National League of Cities ("NLC"), the U.S. Conference of Mayors ("USCM"), the National Association of Counties ("NACo"), the National Association of Telecommunications Officers and Advisors ("NATOA") write to reiterate our request that the Commission refrain from acting on VoIP/IP Enabled Services issues in a piecemeal fashion.

Any action by the Commission on any VoIP issue, let alone an issue as integral as the jurisdictional nature of the service, prejudices the Commission's ability to holistically address the innumerable and important issues that have been raised by the Commission in its IP Enabled Services docket.

As we stated in both our Comments and Replies Comments in the *IP Enabled Services* docket, local government is enthusiastic about the benefits that VoIP may offer local government and its constituents. We strongly support competition, the rollout of new services, and the economic growth that accompanies new technological developments. But prudent policy development requires careful attention to all of the potential ramifications of such developments and attendant regulatory decisions.

Classifying IP services as purely "inter" or "intra"- state could well prejudice the Commission's ability to preserve and protect CALEA; universal service; E-911; consumer protection; compliance with the Americans with Disabilities Act and those other issues outlined in our previous filings. A piecemeal consideration of VoIP issues will limit the Commission's ability to develop a rational and holistic approach to VoIP.

For these reasons, and those previously stated, we urge the Commission to refrain from issuing a jurisdiction classification for VoIP until it is prepared to identify and address the consequences of any such designation.

Don Borut
Executive Director
National League of Cities

Larry Naake
Executive Director
National Association of Counties

J Thomas Cochran
Executive Director
The U.S. Conference of Mayors

Libby Beaty
Executive Director
National Association of Telecommunications Officers and Advisors

(6) ***OCTOBER 20 (Last Week) NARUC URGES FCC TO ACT IN HOLISTIC FASHION - AVOID UNINTENDED IMPACT ON STATE USF FUNDS AND CREATING INCENTIVES FOR SOME PLAYERS TO "SLOW ROLL" CRITICAL USF/ INTERCARRIER COMPENSATION ISSUES. (October 20) (See Below)

A. FULL TEXT - NARUC's October 20, 2004 Ex Parte

Michael Powell Chairman
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: Written Ex Parte filed in the proceedings captioned: IP-Enabled Services proceeding - WC Docket 04-36; In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211

Dear Chairman Powell:

When former Wireline Competition Bureau Chief Bill Maher spoke to the National Association of Regulatory Utility Commissioners in July, he indicated that the FCC might be considering segregating out the jurisdictional issues associated with the IP-Enabled Services proceeding from the other issues in that proceeding. A recent letter from several House members makes a similar suggestion and urges the Commission to expeditiously find that such services are "inherently interstate."1 Significantly, the House letter expresses the "hope that the Commission [also] addresses . . .issues, such as intercarrier compensation, universal service support, public safety, and disability access, in a timely manner as well."

Unfortunately, acceding to the letter's central request virtually eliminates any hope for expeditious action in the related dockets. There is no question that acting in a piecemeal fashion can only undermine resolution of other issues raised in that docket and the related open proceedings on intercarrier compensation and universal service.

Such a premature ruling could prompt existing carriers to mimic AT&T's phone-to-internet-to-phone "least cost routing" to potentially destabilize intrastate access charge regimes as well as erode the support base for the, at least, $1.9 billion that 24 States disburse from their own universal service programs.2 The majority of those programs, as a matter of State law, are based on intrastate assessments. That in turn could increase pressures on the federal universal service program or potentially lead to rate increases for rural and low-income consumers.

Simultaneously, carriers, like Vonage, that terminate in excess of 90 percent of their traffic to the legacy network, and do not now pay into the existing intercarrier and universal service regimes at the same levels as their competitors, will have a perverse incentive to extend the financial advantage provided by the unresolved status of universal service, intercarrier compensation, and related issues raised in the IP Enabled Services proceeding. The question of the jurisdictional status of the services has been one, if not the, primary driver for their participation. Its elimination would provide strong incentives for them to attempt to preserve the status quo.

In any case, the issue of State authority vis-à-vis IP services has attracted a disproportionate amount of attention. Segments of the industry have raised concerns that States will rush toward enacting varying or unnecessary economic regulations on the nascent service, which could risk slowing its deployment in the market.

This concern is, at best, overblown.

Anyone examining the history of regulation, instead of industry rhetoric, cannot avoid the conclusion that Justice Brandeis's State "laboratories" have lead the way with respect to implementing innovative policy. Even a predominately rural state like Iowa, in a range of 14 dockets deregulated everything from Centrex service, to cellular service, to payphones, to intrastate toll, and more. The first such IUB proceeding concluded in 1983.3 Indeed, much of the 1996 Act is based on State experiments with interconnection and unbundling polices designed to encourage competitive entry - experiments, that in some cases, predated the 1996 Act by more than 10 years.

Moreover, while some States are looking at the issue of VOIP and their role in a VOIP world, it does not appear that any States will enact multiple rules anytime soon. The two states that attempted to address aspects of VOIP service under traditional telephone rules, Minnesota and New York, although their actions were initially enjoined by the courts, as the FCC's generic rulemaking suggests, limited their efforts to non-economic issues.4 Significantly, the Minnesota commission's inquiry was focused on the provision of 911 services – something most commenters agree that all providers will have to ultimately provide under the direction of State authorities.

Regardless of what the FCC ultimately decides on jurisdictional issues, we urge the FCC to resist the temptation to act in piecemeal fashion. The Commission should first complete its long outstanding intercarrier compensation proceeding, and then move to act expeditiously and comprehensively on all the issues presented in the IP Enabled Service proceeding simultaneously.

Sincerely,

Stan Wise
NARUC President

Robert Nelson
Chair, NARUC Committee on Communications

Glen Thomas
Chair, NARUC Washington Action Committee

1 Interestingly, that House letter followed a decision by the House leadership not to schedule a markup on precisely the same issue. Moreover, that letter, is somewhat inconsistent with the July 22 Senate Commerce vote on companion legislation. That Senate markup resulted in an endorsement of State authority over VOIP on universal service, intercarrier compensation and E-911 ... and carved out tax jurisdiction from the reach of the bill. Indeed, even the champions of VOIP in the House that signed the letter affirmatively urge the FCC to recognize the "legitimate role of state consumer protection and public safety laws of general applicability."

2 Rosenberg, Ed, Hee Lee, Chang & Perez-Chavolla, Lilia, STATE UNIVERSAL SERVICE FUNDING MECHANISMS: RESULTS OF THE NRRI'S 2001-2002 SURVEY, The National Regulatory Research Institute, Columbus, Ohio (June 2002) at pages 45-6. Cf. Comments of the People of the State of California and the California Public Utilities Commission, filed May 28, 2004 in WC Docket No. 04-36 at page 11. According to those comments, California, based on industry forecasts, estimates that VoIP will account for 40-43 percent of intrastate revenues by 2008: "This amount represents nearly half of the nearly $1 billion funding base for the five state-mandated universal service programs in California."

3 TELECOMMUNICATIONS COMPETITION SURVEY FOR RETAIL LOCAL VOICE SERVICES, A Report of the Iowa Utilities Board, IUB Project Manager: Larry M. Stevens Utility Specialist – Policy Development (January 2004) at page 5 [available at http://www.state.ia.us/government/com/util/Misc/Reports/2004TelecomSurvey.pdf]

4 Indeed, the limited number of States that have already informally or formally examined this issue, have generally focused on issues that all five FCC commissioners agree are worthy of investigation – intercarrier compensation, universal service or E911 capability See, e.g., paragraph 61 of the IP Enabled Rulemaking, where the FCC says: "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways."

B. – NARUC PRESS RELEASE - NARUC SAYS STAND-ALONE JURISDICTIONAL RULING WOULD YIELD UNINTENDED CONSEQUENCES

WASHINGTON, D.C. – The National Association of Regulatory Utility Commissioners (NARUC) sent a letter to FCC Chairman Michael Powell today urging the Commission not to issue a stand-alone ruling that Voice-Over-Internet-Protocol ("VOIP") services are "inherently interstate" because such a piecemeal approach would yield unintended consequences for consumers. An October 5 letter from federal lawmakers had urged the Commission to rule on State jurisdiction first, and the rest of the issues later.

The NARUC letter - signed by NARUC's President, Georgia Commissioner Stan Wise, Michigan Commissioner Bob Nelson, Chair of NARUC's Committee on Telecommunications, and Pennsylvania Commissioner Glen Thomas, Chair of NARUC's Washington Action Committee - concludes:

"Regardless of what the FCC ultimately decides on jurisdictional issues, we urge the FCC to resist the temptation to act in piecemeal fashion. The Commission should first complete its long outstanding intercarrier compensation proceeding, and then move to act expeditiously and comprehensively on all the issues presented in the IP Enabled Service proceeding simultaneously."

The following statements can be attributed to the letter signatories:

NARUC President – Georgia Commissioner Stan Wise: "Tempting as it may be, it's dangerous to front-load the jurisdiction question here because it would short-change consumers that depend on State universal service programs and give many companies a perverse incentive to slow roll the harder issues like access charges, universal service, public safety and consumer protection. Keeping everyone at the table is the fastest path to resolving those issues."

Chair, NARUC Telecommunications Committee – Michigan Commissioner Bob Nelson: "Taking a disjointed, rather than a holistic approach to IP policy, increases the prospects for unintended consequences, confusion, and bad outcomes enormously. The most important thing is to put the consumer at the center of our analysis and recognize the invaluable role States must play on consumer protection, public safety, universal service and maintaining the network."

Chair, NARUC Washington Action Committee - Glen Thomas: "The message from Congress thus far has been one of moderation, including on state authority. We hope when the FCC decides to act, the agency will reflect that moderation in the IP-enabled services docket."

(7) PROBLEM? FCC IS PUTTING THE JURISDICTIONAL CART BEFORE THE INTERCARRIER/USF HORSE.

The word "exclusive" suggests several things about the direction the FCC is headed. Fourteen State Commissions, the Chair of another and a group of 8 commissioners filed comments (as did NARUC) in the IP-enabled Rulemaking. I have summaries of the relevant aspects of those comments (and a few others) appended below. ****One or more aspects of the positions pressed in 16 of the 17 total "State PUC" filings are seriously undermined if not completely rejected by this FCC action.

*******As NARUC's leadership recently told the FCC in an October 20 letter ---- Even if you agree that VoIP should ultimately be considered an Interstate service* – the FCC action is inappropriate BECAUSE**

(a) It gives Vonage and other VoIP providers like it – enormous incentives to slow roll the outstanding IP Enabled Services and intercarrier compensation reform dockets. Once the States are preempted and the FCC has "exclusive" jurisdiction, Vonage can only lose significant aspects of its arbitrage advantage over its competitors if those proceedings are completed.

(b) It is also clear, no matter what you think about the ultimate status of the traffic, from a State perspective – logically, the FCC should *at least* correct or adjust separations factors before making more jurisdictional statements. Moreover, ideally to limit the impact or rather – to make it easier for States to gauge any possible impact of this jurisdictional declaration - the FCC would also take final action in the intercarrier compensation and universal service dockets first.

(c) This ruling, if it does not explicitly completely preempt all State oversight of VoIP service – will likely set the base for arguments that state commission oversight of billing disputes, complaints, number distribution/ conservation to VoIP carriers (pending in another docket) are preempted – without any consideration of those issues.

(d) This ruling learly and undeniably undermines/steadily erodes the funding base for State universal programs.

(8) ***LISTING OF 23 OTHERS THAT ARE ON RECORD IN THE IP ENABLED RULEMAKING -OPPOSING –EXCLUSIVE-- FEDERAL JURISDICTION OVER VOIP.

EXCERPTS FROM COMMENTS IN THE IP ENABLED RULEMAKING:
[Statements undermined/Arguments potentially rejected by proposed FCC Ruling in Bold]

(1) AARP - Residential consumers have come to rely on state regulations to ensure they receive reliable and high quality telephone service and that they have appropriate consumer protections. **Therefore, the Commission should not preclude state authority over VoIP particularly with regard to service quality and consumer protection**. (2)

(2)* Arizona Corporation Commission (ACC) The FCC should be mindful of the significant state interest in ensuring affordable and reliable telephone service and the timely roll-out of advanced services, as well as the states' proximity to markets and consumers. (2) Public policy goals must be balanced against state interests in health, safety, and that consumers have someone at the local level to contact with complaints. (2-3) Given the changing nature of traffic as VoIP services evolve, classification of DSL as an interstate telecommunications service is no longer appropriate. Given that VoIP will be used in many cases as a substitute for local calling, it should not be classified as purely interstate. (11) **Preemption of state jurisdiction over VoIP services would be inappropriate given the significant state interest in ensuring adequate and reliable telecommunications services. (19)** To the extent VoIP providers (or the underlying facilities provider) utilize the PSTN, they should be treated like other telecommunications providers with respect to intercarrier compensation obligations. (18) *Access Charges*. In the event the FCC decides not to impose access charges and intercarrier obligations directly on VoIP providers, such charges should be imposed on

the underlying network provider responsible for VoIP traffic that terminates or originates on the PSTN. VoIP services will utilize and therefore need to support PSTN resources. (18) The FCC should not exempt certain services that utilize the PSTN from charges that are assessed on equivalent services of other providers. (19)

(3)* **California Public Utilities Commission**. From the standpoint of the caller and called party, the voice communication is sent just as it is received without any change in the content or form of the message. (19-20) Real-time voice-grade telephony service marketed to the general public does not lose its character as a telecommunications service simply because it is bundled with other information services. (21) Similarly, protocol conversion does not transform voice-grade telephony service into an information service. (22) Neither does the use of particular customer premises equipment to originate or terminate service convert a telecommunications service into an information service. The nature of a service under the Act's definitions turns on its functionality from the perspective of the end- use customer. Information service means the offering of capability to a user to enable the user to generate, acquire, store, transform, or process, retrieve, utilize, or make available information—what the user does or does not do with the information is dispositive of how the service is defined. (23**) The FCC must be mindful of Congress' intent to maintain a dual regulatory structure, whereby states play a critical role in effectuating public policy objectives.** For voicegrade telephony service over IP, it is both possible and practicable for the state to exercise their authority in harmony with the FCC. (iii) **Congress structured the Communications Act so that the FCC and the state would determine the appropriate regulatory framework nationally and locally, respectively. Congress specified that states may adopt requirements to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers so long as such requirements are competitively neutral and consistent with the Act's universal service provisions.** (16) **Construction of the statute to preempt state authority would be impermissible because Congress has expressly acknowledge a role for the states related to universal service, public safety and welfare, quality of services, consumer rights, and with regard to encouraging advanced services. (31-33**) Voice- grade telephony service using IP is both interstate and intrastate in nature just as service offered by wireline and wireless carriers. (34) It is reasonable to assume calling patterns over IP will be similar to those for conventional telephony, which contain a large majority of intrastate calls. (34-35) Voice-grade telephony service using IP is jurisdictionally severable. It is generally relatively easy to identify an IP call's point of origin. (35) Though VoIP services are not tied to a particular geographic location, such usage is likely to be only a tiny fraction of general use from a stationary point, as is the case for traditional telephony service. (37-38) Functionally equivalent service should be treated similarly when provided by those similarly situated regardless of the technology deployed or the facilities used, in order to prevent undue discrimination and regulatory arbitrage. (iii, 14) Many companies marketing VoIP service to the general public expressly advertise their service as a replacement for, or alternative to, traditional telephony and directly compete with traditional telecommunications carriers. (9) The Act is technology neutral. The natur e of a service depends on whether it meets the definitions in the Act, not on the technology used to provide the service or the facilities used to deploy it. Those who provide functionally similar services are treated similarly. (18)

(4)* **Deborah Taylor Tate –** Chairman of the Tennessee Regulatory Authority. **Assigning IP-services a different jurisdictional classification than comparable wireline services necessarily creates regulatory arbitrage opportunities**. The Commission should employ a functional approach, applying Title II to VoIP services that, from the perspective of the end user, are similar in functionality to and serve as substitutes for traditional telephone service. (4) As evidenced by the existence of regulatory arbitrage opportunities, the existing regulatory construct applied to the circuit switched network is not only ill-suited for VoIP, but often breaks down in its treatment of many non IP-based advanced services and even aspects of traditional telephony services. The Commission should work with state commissions to establish a holistic, consistent, national and unified policy that is based on consumer expectation, does not interfere with industry's deployment of IP enabled services, but encourages investment and promotes consumer welfare. (5) *The FCC should take jurisdiction over VoIP services that appear to have substantial interstate telephony components based on consumer usage.* However, the FCC should move quickly to create a safe harbor for important social policy objectives that should be preserved in a unified regulatory program including universal service, public safety (E911/911) and homeland security (*CALEA*) issues. These policies should be developed jointly with the states. (7) *Consumer Protection CPNI.* **The TRA has gathered substantial experience and expertise in dealing with consumer protection issues. It would be unthinkable for the FCC to preempt states in a manner that renders this expertise idle**. Indeed, this would amount to an abdication of Tennessee's legal statutory state authority, but more importantly, it would be a disservice to the citizens of Tennessee. The FCC should, therefore, partner with Tennessee to ensure that the TRA can continue its valuable work for Tennessee consumers. Absent a compelling need, the competitive IP marketplace should provide adequate consumer protection, as is the case in the highly competitive

wireless industry. Like their wireless counterparts, IP providers should voluntarily provide information to state commissions regarding their customer services and billing dispute process and develop positive working relationships with the TRA. (10-11)

(5)* **Illinois Commerce Commission ("ICC")** While significant authority pertaining to VoIP applications and services should rest with the Commission, **complimentary state and federal standards and coordination are in the public interest and only state requirements shown to be inconsistent with federal standards should be preempted.** (17) VoIP services and applications perceived and used as direct replacements for traditional POTS should be subject to certain basic consumer protection regulations regardless of whether they are PSTN-based or non-PSTN based. Specifically, the FCC should apply its Anti-Slamming and Truth- in-Billing rules to such VoIP services and applications. ******Illinois' analogs to these rules should be applied to complement the FCC rules. Other specific state consumer protection provisions will be fully complementary and consistent with the federal consumer protection requirements appropriately applied to VoIP services and applications and should not be preempted unless shown to be inconsistent with federal standards.** (16-17)

(6)* **Iowa Utilities Board** An IP-enabled service that uses the PSTN transmits information between points without change in the form or content of the information and therefore is a telecommunications service. (2) **Congress has preserved the authority of states to enact requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of communications services, and safeguard rights of consumers.** A state may enforce any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers without contravening the Telecommunications Act of 1996. (3)

(7)* **Maine Public Utilities Commissioners The states should be allowed to handle consumer protection, service quality, and customer complaints, and the FCC should determine national policy issues *in partnership* with the states.** (5) Federal jurisdiction over wholesale rules and intercarrier compensation is most likely to be effective, and there should be one national regulatory scheme and set of regulatory requirements. (11) **State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.** The FCC should have the authority to pool costs within its defined jurisdiction whenever intercarrier compensation raters are high in some areas. (7-10) **The Commission should allow the states to require that all entities using state telephone numbers contribute to a state USF.** [FCC can't do that – statute controls – if its interstate – 5th circuit says no state USF assessments – brad] (6) **Any intercarrier compensation plan should be designed to minimize the cost impact on both federal and state universal service support programs.** (10) A new intercarrier compensation system should integrate universal service, possibly based on the use of telephone numbers as a collection mechanism. In order to provide federal and state support for high-cost areas and low-income customers, the use of and collection of universal service funds may need to be expanded beyond basic wireline service providers. (11)

(8)* **Minnesota Public Utilities Commission -** To the extent that services using IP technology allow the end user to control the form or content of the transmitted call and to determine its destination, those services should qualify as a telecommunication service if offered to the public for a fee. **The FCC should maintain a dual regulatory structure over telecommunications services.** It is reasonable to expect that determination of the points of origin and destination of an IP-enabled service call can become a possibility. Even if the customer is not tied down to any particular geographic location, it may be possible to use proxy methods similar to the ones used for wireless services. The FCC should retain the states' authority over intrastate services. States have an obligation to look into local service issues and to protect customers from the adverse impact of exempting VoIP providers from obligations such as CALEA, consumer protection, 911/E911, universal service, and intercarrier compensation. (10-12) Providers that offer IP-enabled services that use the PSTN should have similar obligations toward universal service, service quality, consumer protection, and public safety as do their competitors and other users of the PSTN. (9)

(9)* **Public Service Commission of the State of Missouri -A**ny IP-enabled service that connects to the PSTN is a telecommunications service and should be treated similarly. (8) **For IP-enabled services deemed telecommunications services, a call that originates and/or terminates within a state's boundaries should be considered as having an intrastate telecommunications component regardless of how or where the traffic is routed.** Percentage interstate usage factors and interMTA factors commonly used to determine the jurisdiction of interexchange and wireless telecommunications traffic could be applied to IP-enabled services. It is reasonable to assume technical requirements may eventually develop that would make it possible to determine the origin of an IPoriginated call. Other methods for

determining jurisdiction include: the point of interconnection, the location of the NPA NXX or the physical location of the NANP individually-assigned number. Such jurisdictional issues should be referred to the Joint Board on Separations for review. (9) Given the level of consumer complaints/inquiries for telecommunications services, regulatory protections may still be necessary, at least on a temporary basis. (9) An IPenabled service provider that provides basic local telecommunications service should be required to adhere to the same requirements as other providers of basic telecommunications service, including quality of service requirements, tariff filing requirements, directory listing requirements, and consumer safeguards. An IP-enabled service provider that provides basic local communications service should have interconnection rights and access to telephone numbers and unbundled network elements. (18-19) - - - To the extent an IP-enabled call connects with and utilizes the PSTN, the traffic should be subject to access charges absent further determination by the Commission in the unified intercarrier compensation regime docket. Rates for IP-enabled services lower than traditional access rates would require LECs to be compensated for IP-enabled traffic from some other means. ******The result would be an increase in universal service support, an increase in end user recurring charges, or the application of a fixed monthly charge similar to the subscriber line charge. No matter what the funding mechanism, the burden would fall on the end user to provide the additional compensation for loss of access revenue. (11-12)** To the extent that IP-enabled services that connect to the PSTN are determined to be information services, or telecommunications services not subject to access charges or some other means of compensation, IPenabled services could increase the cost of providing service on the PSTN. If the Commission determines that some lesser form of compensation is appropriate, revenue neutrality will be necessary to prevent an increase in the cost of providing service. Revenue neutrality could be achieved through a shift in cost recovery from access charges to something akin to a subscriber line charge, increased basic local rates, or increased universal service support. (17-18) IP-enabled services may have an impact on sales tax revenues. Local and long distance carriers contribute substantially to a state's tax base through state and local sales taxes. Because sales taxes are not collected from the end users of IP-enabled services, there may be less taxable revenue derived from end user telephone lines as IP-enabled services become a substitute for traditional telephone service. IP-enabled services may also impact Telecommunications Relay Services funding, and state relay funds, depending on the extent to which IP-enabled services replace traditional telephone service and the legal and regulatory treatment of IP-enabled services. (3-4) IP-enabled services also may impact assessment revenues of state commissions. If end users migrate telecommunications services to services classified as information services, service providers will likely see a reduction in revenues generated by telecommunications services. Consequently, assessments levied by regulatory agencies would be applied against shrinking annual revenue bases and potentially across fewer contributing carriers. (5)

(10)* Montana Public Service Commission - Criteria that evaluate primarily the service being offered rather than the technology through which it is offered should control the classification of services as "information" or "telecommunications." (4) **The authority of states to enforce local service policies should be preserved**. The authority of state commissions to review interconnection agreements for compliance with the public interest in the state should be retained. Using specific public interest criteria to categorize a service being offered and thereby attaching specific rights and responsibilities to that service would allow a state commission to enforce and apply those criteria to ensure that specific issues raised by an intrastate market are addressed. The Commission should develop a list of functional and operational criteria for determining the public interest areas that would justify the appropriate regulatory approach. (4)

(11) *NARUC: National Association of Regulatory Utility Commissioners - Finding that an IP-enabled service is an information service could have negative implications, decreasing consumer protection and increasing consumer risk. Mere differences between different translation or conversion locations for digital formats yield no material reason for separate regulatory classifications; from the end user's perspective, no difference is noticeable. Thus, most, if not all IP-enabled services, especially those that mirror traditional telephone services, should be classified as telecommunications services. (7-9) States have the authority to make public safety regulations so long as they are competitively neutral. This authority is reserved from the circumstances under which the FCC can preempt state action. Even a service's classification as an information service provides no basis for the preemption of all state oversight. State authority can only be preempted only where Congress expressly stated. No such statement was made regarding the wholesale exemption of information services. (10-12) The characteristics of an IP-enabled service, rather than the underlying technology, should be the determining factor in classifying a particular service. The Act demands such a functional approach. Technology- neutral determinations must be made. Such a functionality test would suggest that VoIP services that are similar to traditional telephony should be considered telecommunications services. **Those services that are marketed as telephone substitutes, which have the capability to originate or terminate calls on the PSTN or use numbers in accordance with the NANP, would clearly qualify.(5-7)**

(12) ***National Association of State Utility Consumer Advocates** VoIP services should be classified as telecommunications services because they transmit information of the user's choosing. A transmission occurs whether it takes place over facilities owned by the VoIP provider or over services or facilities that are purchased from a CLEC or ILEC. Transmission also occurs when a VoIP provider has established a centralized server to coordinate the transmission of information between subscribers using the Internet. (11-14) Additionally, VoIP services do not produce a net change in the form of voice communications as sent and received by end users. Employing packet technology to transmit voice conversations transparently does not alter the form of those conversations, despite a possible conversion from one protocol to another, so that they become an information service. (15-22) **The Commission should not preclude state jurisdiction over VoIP, especially in the areas of service quality and consumer protection. The Commission should recognize that state regulators have jurisdictional responsibility over calls that begin and end in their state**. State public utilities commissions have a responsibility to ensure that consumers in their states receive quality telecommunications services and are protected from providers' misconduct. States should not be precluded from enforcing their own consumer protection statutes against VoIP providers. (38-42)

(13) ***National Association of Telecommunications Officers and Advisors** Ancillary jurisdiction cannot give the FCC the ability to preempt state and local regulation. (11) Assigning a purely interstate label to the growing IP-enabled services field could have significant effects in other areas. Many state laws depend on the interstate/intrastate division for funding and other services. In addition, such a sweeping labeling would preempt local police powers that the FCC does not have the power to take over. (27-28)

(14) ***National Consumers League** VoIP is a telecommunications service and should be regulated as such. (1) VoIP is being marketed as a telephone service, and consumers who purchase VoIP will substitute it for their current telephone service. The fact that this new technology may enable providers to offer additional enhanced services, some of which may be information services, does not change the basic nature of the voice services offered. (2) **States should not be preempted from asserting regulatory oversight and applying consumer protection laws when VoIP is used to make intrastate calls**. (1, 7) **VoIP providers must contribute to the federal and state universal service funds.** (1) The priorities underlying universal service will not diminish with the advent of IP-enabled services. However, the amount of money available for universal service will diminish if VoIP providers are not required to contribute. There is no reason to treat VoIP providers differently than other telecommunications providers, which would be competitively disadvantaged if treated differently in this regard. As VoIP becomes more ubiquitous, it may be important to ensure it is affordable to all. (3-4)

(15) ***National Governors Association --** IP-enabled services should not be classified, in a sweeping manner, as information services. To do so would prematurely eliminate the federal-state framework of the Act. **The national federal-state telecommunications framework must be maintained. The technological growth of IP-enabled services has occurred under this framework and state regulatory management of local markets has not impeded such growth. (4-5) IP-enabled services should not all be categorized as interstate. Should any IP-enabled service or some portion of a service be classified as an information service or as an interstate service, the regulatory authority of the states over such services must be maintained. (7) Federal and state authorities should work together to make sure that universal service programs can meet their stated goals. Any changes to the system to better incorporate IPenabled services must be done cooperatively. (6)**

(16)* **Nebraska Public Service Commission –** FCC should look primarily to functionality of IP-enabled devices and the expectations of consumers. Classifying services on the basis of the technology used would create an environment of never-ending rule amendments, declaratory actions, and legal battles. Basing classification on functionality rather than technology will also preserve and advance principles of competitive neutrality. If one or more of the following characteristics are present such service (or portion thereof) should be classified as a telecommunications service: (1) functionally equivalent to traditional telephony; (2) advertises or represents itself as replacement for POTS; (3) utilized as replacement for POTS; (4) utilizes NANPA-administered telephone numbers; or (5) utilizes the PSTN in either originating or terminating traffic. (2, 5-6) FCC should give heavy consideration to expectation of end user in determining state regulatory authority. State commissions are in a suitable position to determine whether or not an IP-enabled device is being offered as a replacement for POTS. State- federal partnership envisioned by 1996 Act must continue. States can work together under Section 253, which preserves states' ability to advance universal service objectives and to protect local interests. (2, 7)

(17)* **New Jersey Board of Public Utilities States must retain level of flexibility to address state-specific conditions.** (4) *The FCC should incorporate a forward-looking view of IP-enabled services, rather than dwell in the past with outdated categorizations of telephony services and providers.* **The FCC should proceed cautiously with any reforms that would result in increased customer charges, *i.e.,* higher subscriber line charges.** (9)Ability of VoIP providers to issue numbers from any geographic area could deter number conservation efforts. The FCC should consider sufficient limits against self- selection of area codes. FCC should also continue to monitor efficient use of numbering resources. (11-12)

(18) **New Jersey Ratepayer Advocate** Blended services of telecommunications and information services should be treated as telecommunications services subject to Title II regulation. State regulators have interest in 911 access, intrastate universal service, service quality, and general health of the telecommunications industry. **The actual origination and termination points of a call is the determining factor in whether a call is either intrastate or interstate.** [this poor lawyer is ducking the policy argument in the frail hope that someone will actually pay attention to precedent and the text of the statute….novel approach] **Technical information in this docket should reveal providers ability to track calls. Where a VoIP service is marketed and sold as a substitute for traditional telephone service, consumers may have expectations that basic telephone service issues will be provided (E911, service quality).** (15-19)

(19) **Attorney General of New York** *FCC should require VoIP providers to comply with existing federal and state consumer protection rules and regulations – ability to block pay-per-call services, termination without notice, deferred payment plans, dispute contest charges, complaint procedures. Same protections are necessary because services are substitutes for current local and long distance offerings*. (11-12) State attorneys general and FTC serve essential functions protecting against deceptive business practices or advertising. Truth- in-billing requirements are also essential to protect consumers. (13)

(20)* **Public Utilities Commission of Ohio -** Certain IP-enabled services should be considered telecommunications services only if they meet four basic factors: (1) the provider offers fee-based voice telephony to the mass market, either as a stand-alone or bundled together with other services, that is a functional substitute for local telephone service; (2) the service sends information, chosen by the user, by originating or terminating calls over the PSTN; (3) information is received without a net change in form or content; (4) the NANP routes the calls. Only if all four factors are met should the VoIP be considered a telecommunications service. (9-12) In evaluating the first factor, one should handle the migration to packet switching in the same manner as the FCC handled the migration from analog to digital switches: it did not change the underlying and fundamental analysis of the functionality of the service nor should it necessarily change the underlying regulatory system. The type of equipment should not be taken into account. Nor should the marketing or packaging of the service affect the decision. (12-14) The remaining factors also provide the ability to determine telecommunication versus information by looking at the physical attributes of the proposed system to ascertain functionality. If an IP-enabled service wishes to use the telecommunications system, it should have to take on the regulatory jurisdiction and responsibilities as well. (14-15)
******Only VoIP services that function as telecommunications services should be treated as such under the 1996 Telecommunications Act, ****with state authority to regulate.** That authority is preserved in § 253(b) requirements to maintain openness and public safety and welfare. Only that which was either expressly provided in the 1996 Act or exhibits implicit conflict between state and federal law can be preempted by the federal government. Neither exists here. (18-28) Access Charges. Any service provider that uses the PSTN, regardless of the technology involved, should be obligated to make similar compensatory payments, so that one type of provider does not have an economic advantage over all others. (34-35**) Issues regarding interconnection should also be settled in the same manner for VoIP telecommunication services as they are already for non- VoIP telecommunication services. (44-46)** The separation between telecommunication-like VoIP and information-like VoIP would allow the FCC to require fees only to those in the former category. Treating likefunctioning systems similarly would allow the FCC to establish regulatory parity among all local providers, regardless of the technology used to provide the service. (29-32)

(21) ***People's Counsel for the District of Columbia (OPC-DC)** The Commission should classify as telecommunications services, and regulate under Title II of the 1996 Act, all VoIP services that 1) are functionally equivalent to and serve as substitutes for plain old telephone service; 2) are marketed to the public as a telephone service; 3) use the PSTN to originate and/or terminate calls; or 4) use telephone numbers administered by the North

American Numbering Plan. (4-6) The Commission should employ the "mixed use" doctrine and determine that VoIP services that originate and terminate calls within a state should be subject to that state's jurisdiction. (7-8) **Any service provider that uses the PSTN to provide its service should contribute to** federal and **state universal service funds.** This policy should be adopted under in a matter that is competitively neutral so as not to hinder development of effective competition. (12) **VoIP services should be subject to** federal and **state service quality standards and other consumer protection measures and consumers should be entitled to the same consumer protections whether their telephone service is carried over the PSTN or the Internet.** While the Commission's policies should promote the development and growth of new technologies, this should not be done at the expense of the consumer. (9)

(22) *Texas Coalition of (110) Cities for Utility Issues – Because VoIP is used as a telecommunications service and is so marketed by its providers, it should be considered as such by the FCC. Even though VoIP providers manipulate the sent data to travel across the Internet, there is no permanent change to that data. Rather, VoIP is identical to a traditional telephone call from the consumer's perspective. Function must control the classification, not technology nor the type of facility used. (6-7) Providing local exchange service via VoIP should be considered local access lines and as such, should be subject to state regulation without FCC preemption. Characterization of the service in this manner is of vital fiscal and regulatory importance. (2) ***Access Charges.*** **To exempt VoIP providers from state "access line fees" would grant those providers a competitive advantage over other local exchange service providers for no reason othe r than the underlying technology**. (5-6) For interexchange access charges, once a provider accesses the PSTN, the providers should bear that cost. Functionally equivalent services should subject their providers to similar obligations, regardless of whether the access charges are dictated by federal or state law. (8-10) USF obligations should apply equally to all local exchange service providers. To provide otherwise would yield a regulatory advantage to VoIP providers based solely on technology. (5)

(23) Texas Department of Information Resources – State agency that manages the private telecommunications network for Texas state government. **Any VoIP provider that markets its service as a replacement for traditional telephone service must be held to the same quality of service and consumer protection requirements that now apply to traditional telephone service providers.** The lower price that might be gained from withholding such requirements is not worth substandard quality of service, compromised security, and a lack of protection for the consumer. (6-7)

(24) Utah Division of Public Utilities – Concerned with how VoIP is defined as it is with the functional equivalence to traditional phone service and interconnection with the PSTN. Under Utah law, if a telephone call is originated and terminated using the PSTN to connect two voice conversations to connect two voice conversations, it should be regulated as functionally equivalent to traditional telephone service and should be treated in a similar fashion to similar services. (3-4) The FCC should regulate some portions of VoIP, but states should maintain governance over other parts of VoIP. **The following areas should be regulated at the state level due to their localized nature: quality of service, consumer protection issues, the Universal Service Fund, and Emergency 911. Quality of service and consumer protection issues include minimum voice grade requirements, call completion standards, discontinuity of service, customer privacy, and mediation complaint procedure. (5-6) Issues with identifying the jurisdiction nature of traffic is "substantially overstated." It may be necessary to identify calling patterns and minutes of use in order to allocate costs between jurisdictions. VoIP providers that provide equivalent of local service needs certificate of operating authority from state, including annual reports and price lists. (5- 6) Majority of voice calls today are intrastate. (5)**

(25) Vermont Public Service Board A service cannot be classified as an information service if it includes paid, generally available transport of information between two third parties. An attempt by the FCC to do so here would lead to years of uncertainty and litigation. To classify an IP-enabled service as an information service would also weaken states' abilities to protect their citizens and would complicate universal service. (19-21) If IP-enabled services were classified as information services, then the FCC would not have the ability under Title I of the Act to support all the necessary public protection requirements. Ancillary jurisdiction has a slim statutory anchor; importing major sections of regulations from Title II into Title I would not be authorized by the Act. Consumer protection, disability access, CALEA, 911 and E911 access, and interconnection requirements would all be at risk, along with access and reciprocal compensation charges. Such a classification would also complicate separations and universal service by making federal preemption of state action easier and thus removing major funding sources that are used to provide necessary resources. In addition, it would jeopardize states' ability to determine what ILEC operations should be considered as "below the line" for state ratemaking purposes. (22-27) **Preemption of state regulation is not justified. Divergent regulations**

do not necessarily impose harm on IP-enabled services and their providers; in fact, such divergence is often recognized as the best way to develop new policies. Actions taken by states already have been responsible and harmless. If state authority is preempted, then states will be unable to protect their citizens in many of the telephone service realms where the state traditionally has exerted such authority. Even if the FCC concludes that IP-enabled services are information services, it does not have the right to preempt state action. Under Title I, the FCC is given the responsibility for all "interstate and foreign communication by wire or radio." That exact phrase is used in Title II. If IP-related services do not meet that level in Title II to be classified as a telecommunications service, then it cannot meet that level in Title I to grant the FCC sole regulatory power. Neither Section 230 nor Section 706 of the Act grants federal preeminence in the IP-enabled service industry. Both have far too narrow a scope to be extended globally to all Internet services. (28-37)

(26)* Virginia State Corporation Commission - VoIP service is clearly a telecommunications service as defined by the Act, the Stevens Report, and common sense. Every IP-telephony service that uses NANP telephone numbers meets the Act's definition, which does not look at underlying technology. VoIP also meets the four criteria of the Stevens Report: (1) such providers hold themselves out as a provider of voice or facsimile transmission; (2) the customer is not required to use CPE that is different from what is used to place calls over the PSTN; (3) the customer is allowed to dial NANP numbers; and (4) the providers transmit customer information without a net change in form or content. Additionally, if VoIP service is used as a replacement for POTS, and the consumer expects it to be, then it must be considered a telecommunications service. Broadband requirements should play no role in classification, so long as they function in the same manner as is described above. (3-7) The boundaries of 47 U.S.C. § 152(2)(b) move certain types of common carrier telecommunications service oversight beyond the reach of the FCC and place them under state jurisdiction. Only Congress can alter these jurisdictional boundaries and it has not done so. **In addition, the override authority given to the FCC is available only on an as needed basis and cannot be exercised preemptively or anticipatorily. End to end analysis should still be used to determine jurisdiction of an IP-telephony service voice call, just like any other voice call over a POTS line.** The mixed- use doctrine is inapplicable because the utilization of NANP telephone numbers can and should be used to identify the originating and terminating points of a call. Those numbers are tied to the customers' primary locations, even if they are not the actual physical locations for a particular call. Jurisdictional conflicts could only come into existence when NANP numbers are given with no regard for physical location, though the FCC would not normally permit such a practice for other LECs. Virtual exchanges could be tied to the "location" of the phone number used, rather than the customer's physical location, for purposes of jurisdiction determination. The potential mobility of an IP-enabled service, however, could reasonably be treated as an exception in determining jurisdiction. (8-16) *Access Charges*. If the FCC determines that VoIP is an interstate telecommunications service, then only interstate access charges should apply. If VoIP is considered multi-jurisdictional, though, then the current compensation system of both interstate and intrastate access charges should be imposed upon VoIP providers. (16)

(27) Group of 8 State commissioners filing jointly – [that pretty much agree there should be no state authority at all] VoIP providers should voluntarily (?) provide contact information and escalation lists to federal and state agencies that are likely to receive consumer complaints about VoIP service. (17)